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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MICHAEL BOGDAN et al., Plaintiffs and Appellants, v. MICHAEL F. POLAK, SR., Defendant and Respondent.	B306264 (Los Angeles County Super. Ct. No. BC686150)
MICHAEL BOGDAN et al., Plaintiffs and Appellants, v. MICHAEL F. POLAK, SR., Defendant and Appellant.	B309780 (Los Angeles County Super. Ct. No. BC686150)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. Mark Kim, Judge. Judgment in case No. B306264 affirmed. Orders in case No. B309780 affirmed in part and reversed in part.

Law Offices of Jonathan D. Winters and Jonathan D. Winters for Plaintiffs and Appellants.

Koletsky, Mancini, Feldman & Morrow, Marc S. Feldman and Brett G. Hampton, for Defendant and Respondent and for Defendant and Appellant.

Michael, Kristen, Tate, and Anabelle Bogdan (the Bogdans) sued their former landlord, Jacqueline Pace (Pace), alleging a variety of tort and contract claims. Pace died after the notices of appeal were filed. We granted the motion of her husband, Michael F. Polak, Sr., to substitute in for Pace in these proceedings. Because Pace's death occurred after the conclusion of the trial court proceedings, we refer to the defendant in the trial court as "Pace," but when discussing the appellate litigation, we refer to the defendant as "Polak."

Some causes of action were disposed of by nonsuit, and others were rejected by the jury after trial. In case No. B306264, the Bogdans allege the trial court violated the Fourteenth Amendment to the United States Constitution; denied them the right to make a fair opening statement; improperly denied two motions for mistrial; made erroneous evidentiary rulings; improperly granted nonsuit on multiple claims; and failed to give proper jury instructions. In case No. B309780, Polak appeals the trial court's denial of Pace's motions for attorney fees and for relief under Code of Civil Procedure[1] section 473, subdivision (b). The Bogdans also appeal in case No. B309780, alleging the court erred when it awarded Pace expert witness fees and denied their request for cost of proof sanctions. We affirm the judgment in case No. B306264. In case No. B309780, we affirm the orders

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[1] All undesignated statutory references are to the Code of Civil Procedure.

denying attorney fees, section 473 relief, and cost of proof sanctions; we reverse the award of expert witness fees on the ground that the offer to compromise under section 998 was not valid.

FACTUAL AND PROCEDURAL BACKGROUND

According to their First Amended Complaint, the Bogdans rented a house from Pace in 2016 and 2017. The Bogdans claimed Pace intentionally concealed from them the house's previous problems with water intrusion and mold, and that these problems had not been properly remediated. They alleged these problems recurred during their tenancy, causing property damage and health problems. The Bogdans alleged Pace again failed to remedy the problems during their tenancy, attempted to shift associated costs to them, attempted to evict them and then sued them. The Bogdans alleged breach of the implied warranty of habitability, retaliatory eviction, breach of the implied covenant of quiet enjoyment, constructive eviction, fraud/concealment, private nuisance, intentional infliction of emotional distress, premises liability, negligence, negligence per se, breach of contract, and breach of the implied covenant of good faith and fair dealing. The relief they sought included punitive damages.

During trial, the Bogdans twice asked the court to declare a mistrial. First, they moved for a mistrial after the court refused to permit their expert witness on water intrusion and the roofing of the house to continue testifying after he testified his opinion was based entirely on observations of the home long after the events that gave rise to the litigation. Second, they sought a

mistrial on the ground they had been incurably prejudiced by a reference to insurance. The trial court denied both motions.

The trial court granted Pace's motion for nonsuit on five causes of action and the request for punitive damages. After deliberations, the jury found against the Bogdans on all remaining causes of action.

On February 20, 2020, Pace filed a memorandum of costs that lacked a verification signature.

The court entered judgment in Pace's favor on March 6, 2020. That same day, the clerk of the superior court served notice of entry of judgment and dismissal on the parties by mail. The Bogdans filed motions for a new trial and for judgment notwithstanding the verdict. After a telephonic hearing on May 13, 2020, the court denied both motions. The Bogdans appeal from the judgment in case No. B306264.

The Bogdans filed motions to strike or tax Pace's memorandum of costs and for cost of proof sanctions. On August 18, 2020, Pace filed a motion for attorney fees and a motion under section 473 seeking relief from untimely filing the attorney fees motion.

The trial court denied all four motions. In case No. B309780, Polak appeals the denial of the motions for relief under section 473 and for attorney fees. The Bogdans cross-appeal the denial of their motions to strike or tax Pace's memorandum of costs and for cost of proof sanctions.[2]

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[2] The Bogdans have requested judicial notice of 17 different items in conjunction with the appeal in case No. B306264 and eight items in conjunction with the appeal in case No 309780. Eleven items are state or local laws, four are described by the Bogdans as trial exhibits, four are opinions in California cases, three are the records in these appeals and an item within the

DISCUSSION

I. Issues Devoid of Argument and Authority

The Bogdans' first argument reads in its entirety, "Court violated Bogdan's 14th Amendment Right to Due Process and Equal Protection under the law, see infra." Their second argument is, "Court would not allow Bogdan's opening statement to tell jury that evidence will show Pace concealed [record citation]. Court later granted non-suit on it, (infra)."

"A touchstone legal principle governing appeals is that 'the trial court's judgment is presumed to be correct, and the appellant has the burden to prove otherwise by presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited. [Citations.] [¶] It is the appellant's responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant's behalf.' [Citation.] '[A]n appellant must present argument and authorities on each point

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record, one is a dictionary definition, and one is a complaint in another action. We take judicial notice of the statutory and decisional law of this state, of the Rules of Court, and of the Long Beach Municipal Code. (Evid. Code, § 451, subds. (a) & (c); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 848, fn. 6; *Urgent Care Medical Services v. City of Pasadena* (2018) 21 Cal.App.5th 1086, 1094, fn. 5.) We take judicial notice of the record in case No. B306264 and in case No. B309780; we need not take judicial notice of items already in the record on appeal. (*Getz v. Superior Court* (2021) 72 Cal.App.5th 637, 644.) We decline to take judicial notice of the dictionary definition or the complaint in another action, as they are not relevant to the dispositive points on appeal. (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 266, fn. 13.)

to which error is asserted or else the issue is waived.' [Citation.] Matters not properly raised or that are lacking in adequate legal discussion will be deemed forfeited. [Citation.] [¶] In other words, it is not this court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness. Rather, an appellant is required to present a cognizable legal argument in support of reversal of the judgment. 'When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary.' [Citation.] 'Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, [they are] waived.' " (*Okorie v. Los Angeles Unified School District* (2017) 14 Cal.App.5th 574, 599–600 (*Okorie*), disapproved on other grounds in *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1012, fn. 2.)

The Bogdans have failed to support these claims of error with cognizable legal argument supported by factual analysis and pertinent legal authority. They have forfeited these claims and, accordingly, we decline to consider them.

II. Denial of Mistrial Motions

"[A] trial court has the discretion to declare a mistrial when 'an error too serious to be corrected has occurred.' [Citations.] Among the recognized grounds for a mistrial are ' "any . . . irregularity that either legally or practically prevents . . . either party from having a fair trial." ' [Citation.] Whether a particular trial incident has incurably damaged a party's right to a fair trial is by its nature largely a qualitative matter requiring an assessment of the entire trial setting. For this reason, trial courts are vested with wide discretion in ruling

on mistrial motions. [Citation.] The trial court, 'present on the scene, is obviously the best judge of whether any error was so prejudicial to one of the parties as to warrant scrapping the proceedings up to that point.' [Citation.] A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged. [Citation.]" (*Velasquez v. Centrome, Inc.* (2015) 233 Cal.App.4th 1191, 1214.)

A. *First Motion for Mistrial*

The Bogdans first moved for a mistrial after the trial court excluded the testimony of Gary Weaver, an expert witness concerning roofing and water intrusion. The Bogdans allege the court refused to permit Weaver to correct an error he made during his testimony when he misidentified a photograph taken by others as one he had taken, "and his testimony was excluded as [a] result." They claim it was error to refuse to permit them to recall Weaver to correct the misidentification because witnesses may correct their testimony. They argue that as a result of the ruling the jury was misled into believing the Bogdans had lied about the date of a key photograph showing a ceiling leak.

The record demonstrates the problem with this expert witness was far more profound than the misidentification of a photograph: Weaver was not permitted to give his expert opinion because he repeatedly and adamantly denied that he based his expert opinion on evidence relating to the condition of the house's roof during the relevant time frame; rather, he maintained that his opinion was based entirely on observations of the property years after the time period in question. The problem began immediately after Weaver was qualified as an expert witness, when the Bogdans' counsel asked Weaver to look at a photograph and Weaver began to testify about the layout of the home. The

court asked Weaver if he was testifying from the photo that he took, and Weaver testified he had taken the photograph in March 2019.

At sidebar, the court advised that the ceiling appearance in 2019 was not relevant to its condition in 2017. The Bogdans' counsel explained Weaver was mistaken about taking the photograph, but the court said it could only rely on Weaver's testimony that he took the photograph in March 2019.

When questioning resumed, the court asked Weaver if he was rendering an expert opinion on the basis of his inspection of the site and the photographs he took. Weaver described his site visit and testified his opinion was entirely based on what he did on the date of his inspection. He did not review the Bogdans' deposition testimony. Weaver could not remember the exact date of the inspection but it was in 2019.

After further sidebar argument, the court released the jury for the day and asked the witness to step outside. The court explained the problem with Weaver's testimony was that he was rendering opinions about the property in the year 2017 based on inspections two years later. The Bogdans argued that in fact Weaver based his opinion on the photo that was actually taken in 2017, and they claimed Weaver's deposition testimony demonstrated his opinion was based on 2017 photos.

The court permitted the Bogdans' counsel to examine Weaver again. Asked if he was completely certain that he had taken two particular photos, Weaver testified that he took them himself. The court asked, "How are you sure that the photo that is there . . . is the photo that you took?"

"I recall taking it," answered Weaver. He confirmed he had taken the photograph between December 2018 and March 28, 2019.

The court asked Weaver to step out again. The Bogdans' counsel asked to refresh Weaver's memory with his deposition transcript, but after reviewing a selected portion of that transcript, the court concluded it was not helpful because the photo being discussed at the deposition was not identified or marked, so the court could not know if the photo discussed at deposition was the photo being discussed in court.

The court allowed the Bogdans to question Weaver once more. Weaver testified that to reach his expert opinion, he relied on his personal walk-through of the site on December 12, 2018. The court asked, "So the only thing that you relied on in reaching your opinion relating to water intrusion, roofing issues, are your walk-through—."

"Yes," Weaver answered.

"—on the day of December 12th, 2018?" the court continued.

"Yes," Weaver answered again.

"So what you saw December 12th of 2018 is the basis of your opinion[?]" the court asked.

"Yes, it is," said Weaver. He confirmed there was no other basis for his opinion, stating that aside from national standards, "[M]y visual inspection and the moisture meters and the infrared photographs that I took that day are the sum balance of my observations and my basis of my opinion."

The court asked again, "So your opinion is based on what happened on December 12th, 2018?" and Weaver responded in the affirmative. The court asked Weaver to leave the courtroom again.

The court stated Weaver's testimony was irrelevant because his opinion was based on what he observed in December 2018 but "[t]he issue at hand happened in 2017. April was the

last time that the city inspector went out. So there's clearly—whatever he observed [i]n December of 2018 is irrelevant, because it does not accurately depict the condition of the property in dispute in March of 2017."

The Bogdans' counsel argued excluding Weaver's testimony would result in a miscarriage of justice. At the Bogdans' request, the court brought Weaver in one more time and asked, "Can Mr. Winters [the Bogdans' counsel] help you by allowing you to look at anything to refresh your recollection as to whether or not the photo of the ceiling is actually the photo that you took?"

"No," Weaver testified, "These are—these are photographs that I took."

The court excused Weaver.

The Bogdans later asked the court to allow them to recall Weaver and submitted a declaration in which Weaver said he had been mistaken. The court refused to let Weaver testify because Weaver had consistently denied his opinion was based on anything other than his site inspection.

The Bogdans argued it would violate due process to deny them the opportunity to present their case and to call a roofing expert. The court noted that the Bogdans had been given 30 to 45 minutes to lay the foundation for Weaver's testimony. "You attempted to rehab him. Court tried to give him opportunity to rehab him. He read. He was given opportunity to use documents to refresh his recollection. He said he didn't need it. He didn't need his memory to be refreshed, because he was certain that his opinion—the opinion that he would render related to roofing—would be based on what he personally saw when he went to the property, the photos that he took on the day that he went to the property. [¶] Based on that, [the] court ruled that there's [a] lack of foundation, because an expert cannot tell the jury the condition

of the property at the contested time when he did not see anything relating to the condition of the property during the conflict in time; that his observation was basically something that happened a year and a half after the conflict."

The court was not persuaded by Weaver's declaration because Weaver had been questioned at length and had been consistent and emphatic in his testimony. "And then after he speaks to you, now he produces a declaration that whatever he said about five times is not true." The Bogdans' counsel said he needed only 15 minutes to lay the proper foundation for Weaver's testimony, and the court answered, "This is only after you had coached him, because you had that chance on the day that we did this outside the presence of the jurors; did you not? You had 45 minutes."

The Bogdans' counsel argued it would be a miscarriage of justice to refuse to permit Weaver to "clarify his mistake," and it would prejudice their right to a fair trial. Counsel said that if the court excluded Weaver, he would have no choice but to move for a mistrial. The court denied the motion for a mistrial.

Because they have reduced the court's ruling to a refusal to allow Weaver to correct the record and have failed to offer argument showing error in the court's actual ruling, the Bogdans have failed to establish the trial court erred in denying their mistrial motion. "It is not this court's role to construct arguments that would undermine the lower court's judgment and defeat the presumption of correctness. Rather, an appellant is required to present a cognizable legal argument in support of reversal of the judgment and when the appellant fails to support an issue with pertinent or cognizable argument, 'it may be deemed abandoned and discussion by the reviewing court is

unnecessary.' " (*Needelman v. DeWolf Realty Co., Inc.* (2015) 239 Cal.App.4th 750, 762 (*Needelman*).)

B. *Second Motion for Mistrial*

Prior to trial, the court sustained Pace's motion in limine to bar references to insurance. According to the Bogdans, the court nonetheless permitted defense counsel to "inject insurance and collateral source benefits" into the case. They cite to the testimony of a Kaiser Permanente financial services (Kaiser) witness. On direct examination, counsel for the Bogdans questioned the witness on the amounts of benefits provided by Kaiser to each of the Bogdans and introduced the Kaiser financial records into evidence. On cross-examination, Pace's counsel elicited testimony that the amounts, described as liens, represented the benefits provided to the Bogdans and that the amounts had been paid by their health plan. The Bogdans did not object to this cross-examination.

Several days later, while conducting the direct examination of an expert who had examined the Bogdans' medical records, defense counsel asked why it was important to determine whether a person had sought medical care while potentially exposed to an allergen. Counsel asked, "[I]s one of the other things you look at [] whether the individual has insurance? Because unfortunately—."

The Bogdans objected, and the trial court sustained the objection. Defense counsel said, "Medical insurance," and the Bogdans objected again.

At sidebar, the court asked why counsel needed to discuss insurance, and defense counsel explained he asked the question because if a person has medical insurance, he or she is more likely to get treatment, while a person without insurance is less

likely to obtain treatment. Here, the Bogdans had insurance coverage. The court said, "The problem is once you bring in the issue of insurance, that could be a problem for the panel. No. 2, you can ask the very same question by rephrasing whether or not there was any evidence of financial burden that would cause them not to see a doctor."

The Bogdans asked for an admonition or instruction to the jury to disregard what defense counsel had said. The court agreed to re-read the insurance instruction it had given the jury at the start of trial, and it then advised the jury, "You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence."

Later that day, the Bogdans moved for a mistrial, alleging they had been incurably prejudiced by the insertion of the word "insurance" into the case. The court denied the motion for mistrial, noting that it had already instructed the jury on the irrelevance of insurance. The court also told the Bogdans' counsel, "But I mean, you're the one that basically mentioned Kaiser throughout this process. Most people know what Kaiser is."

The Bogdans' counsel complained he had complied with the court's ruling on the defense motion in limine about insurance, but defense counsel had not. The court reminded counsel he had to show prejudice to warrant a mistrial, and "[t]here's no prejudice because, one, the court addressed that issue. Two, you're the one that kept mentioning Kaiser record, Kaiser record, Kaiser record. I think it's very difficult for people not to know what Kaiser record is."

The court did not abuse its discretion. Defense counsel's mention of insurance was brief, the court immediately remedied

it with its instructions to the jury, and neither in the trial court nor on appeal did the Bogdans demonstrate that the reference to insurance irreparably damaged their chances of receiving a fair trial or that the court's curative efforts were insufficient to address the problem.

The Bogdans make several additional allegations in this portion of their opening brief, but none of them pertain to the correctness of the court's mistrial ruling. "Although we address the issues raised in the headings, we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument." (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294–1295.)

C. *Unrelated Argument*

Sandwiched in the Bogdans' briefing between their contentions about the first and second mistrial motions is an argument heading entitled, "Judicial Misconduct." The passage consists solely of a case citation and a citation to several hundred pages in the reporter's and clerk's transcripts and the words, "See infra." This is insufficient to present any argument to this court for review. "One cannot simply say the court erred, and leave it up to the appellate court to figure out why." (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.)

III. Evidentiary Rulings

The Bogdans set forth the general principle that it is reversible error to erroneously deny a party's right to testify or present evidence establishing its case. They then state, "Court did not allow Bogdens [*sic*] witnesses to finish their answer to questions asked or provide clarification upon request," and they

list seven pages in the reporter's transcript without identifying any rulings or analyzing any alleged error. They then state another general principle of law regarding restrictions of a party's right to cross-examine witnesses. This is insufficient to present an argument on appeal. An appellant must offer argument as to how the court erred, rather than citing general principles of law without applying them to the circumstances before the court. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699 (*Landry*).)

A. *Negligence Claim Issues*

Under the heading, "Negligence," the Bogdans allege the court would not allow them to ask Pace whether she set up containments or plastic sheeting barricades. The record, however, shows the Bogdans' attorney twice tried to ask a question about containments or plastic sheeting, but each time the court sustained an objection and instructed him to rephrase the question. Rather than try a third time to frame the question, counsel asked Pace about another topic.

The Bogdans also claim their counsel tried to question Pace but the court "interrupted counsel mid-sentence to take [a] restroom break," and then, when the jury returned, "instead of letting counsel finish pending question or get [a] response[,] [the] court stopped the examination." They claim they were "denied [the] opportunity to get Pace's answer as to whether she or [the] handyman ever set up containments as recommended."

While it is true that the court interrupted the Bogdans' counsel mid-question because a juror needed the restroom, the record does not support the assertions that the court would not allow counsel to finish the pending question when proceedings resumed or that it "stopped the examination" at that time.

Before the jurors returned from their break, the parties and the court discussed the possibility of a settlement. The court determined the parties were not close to settling, so the trial would proceed. At that point, the Bogdans' counsel called his next witness, and he examined that witness once the jury returned to the courtroom. The Bogdans did not ask to examine Pace further or object that the court had truncated their inquiry. " ' "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court." ' " (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830.)

B. *Retaliatory Eviction Issues*

Without explanation, the Bogdans assert, "Court knew these were 3 day 'eviction' notices before trial [record citation], but during trial told jury they were 'just notices.' " It appears this may be a reference to the court instructing their counsel to identify a document by its title, a three-day notice, rather than calling it an "eviction notice," but the Bogdans do not develop any argument and have forfeited this issue. (*In re Phoenix H.* (2009) 47 Cal.4th 835, 845 [counsel's duty to show by argument and citation of authority the reasons why challenged rulings are erroneous; unsupported contentions are deemed abandoned].)

The Bogdans next complain that the court "excluded small claims and UD [unlawful detainer]." The court ruled the Bogdans could use the three-day notice as evidence that Pace retaliated against them for complaining to local government, but the small claims or unlawful detainer actions were excluded under Evidence Code section 352. We review a decision that evidence is more prejudicial than probative under Evidence Code

section 352 for an abuse of discretion. (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1000.) The Bogdans assert the small claims and unlawful detainer actions were relevant and the court should have permitted them to be presented as adverse actions taken against them. Nonetheless, this argument does not demonstrate error in the court's balancing of probative value and prejudicial effect as required by Evidence Code section 352.

Next, the Bogdans assert they requested instructions on retaliatory eviction and for the court to take judicial notice of the date on which the adverse actions were filed against them. They state adverse actions were taken against them within 180 days of the time they exercised their First Amendment rights to complain to local government about habitability issues, and they say they requested a limiting instruction. It is unclear from these sentences what error or errors, if any, the Bogdans allege the court made in this regard. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry*, *supra*, 39 Cal.App.4th at pp. 699–700.)

1. Complaints about Defense Counsel

The Bogdans argue defense counsel injected the issue of late rent into the case by referring to it during opening statement despite previously representing he would not. The Bogdans do not acknowledge the court overruled their objection to defense counsel's opening statement because they had already raised the issue of late rent. The Bogdans have not argued, let alone established, any error in this ruling, nor have they explained how this argument is relevant to the topic of this section of their briefing, the alleged denial of the right to present relevant evidence.

2. "Denial of Right to Elicit Relevant Testimony and Discourteous Treatment"

In an argument entitled, "Denial of Right to Elicit Relevant Testimony and Discourteous Treatment," the Bogdans state general principles concerning the examination of adverse witnesses, then devote the remainder of their argument almost exclusively to a series of one- or two-sentence complaints about specific purported trial court actions or defense counsel conduct. These assertions lack context, often ignore the actual ruling or statement made by trial court, neglect to identify how the complained-of action was erroneous or improper, and are unsupported by legal argument with citations to pertinent authority. Such a presentation has long been considered insufficient to raise issues on appeal. "[N]o reasons are given why the court erred, no views are presented as to the questions sought to be raised, and no authorities cited. Under these circumstances, we can hardly be expected to do the work of counsel, and elaborately hunt up and consider what counsel has not argued." (*Gavin v. Gavin* (1891) 92 Cal. 292, 292–293.)

In only two instances in this section of their brief do the Bogdans present any argument with citation to authority. First, the Bogdans claim the court was surprised by Pace's affirmative answer when the court asked if the three-day notice she served on the Bogdans was either to cure or evict, and they assert the court "led" Pace to say it was not an eviction notice but rather "just to get late fees cured for not paying rent." (Underscoring omitted.) The record does not show the trial court "led" Pace to say anything: The court asked Pace if the notice in question was a three-day notice to cure or evict, and when she agreed, the court asked what she wanted the Bogdans to cure. "The late fees," she responded.

The Bogdans state that in *Green v. Superior Court* (1974) 10 Cal.3d 616, 635, the California Supreme Court held a tenant's duty to pay rent is mutually dependent on the landlord's fulfillment of the implied warranty of habitability. They also state that in *Green*, the court cited *Groh v. Kover's Bull Pen, Inc.* (1963) 221 Cal.App.2d 611, "which was a case factually like [the] Bogdens [*sic*]." The Bogdans do not make any argument as to how *Green* or *Groh* applies here. Citing general principles of law without applying them to the circumstances before the court is insufficient; an appellant must offer cognizable legal argument. (*Landry, supra*, 39 Cal.App.4th at p. 699.)

Second, the Bogdans complain the court would not allow them to read into evidence Pace's admission at her deposition that she caused an "eviction notice" to be served on the Bogdans. In the portion of the record cited by the Bogdans to support this argument, the court denied permission to read from the deposition because the Bogdans' counsel had not yet laid a foundation for it. The Bogdans argue section 2025.620 authorized them to read the testimony. That provision allows a party to use a deposition to contradict or impeach the testimony of a deponent as a witness, but it does not require the court to permit the deposition to be read before the witness gives testimony to contradict or impeach. The Bogdans have not demonstrated any error.

C. *Concealment Claim*

The Bogdans claim they were not permitted to elicit certain information from Pace, but the record shows the questions to which objections were sustained were argumentative. Pace testified the prior sellers of the home did not disclose problems with the property. The Bogdans impeached her with her

deposition testimony in which she had testified the sellers had disclosed problems to her. The Bogdans' counsel then formulated multiple questions in which he reminded Pace she was under oath, told her both answers could not be true, and asked her which answer was "the truth" and which was false. Pace objected to each question, and the objections were sustained.

The Bogdans do not claim the questions were not argumentative or the court's evidentiary ruling was incorrect; they just complain they were not allowed to ask the question and assert the evidence was relevant. "Control of cross-examination of a witness as to which of his conflicting statements is true should be in the sound discretion of the trial judge. The purpose of such cross-examination is ascertainment of the truth, and if . . . that purpose can be furthered by direct questioning as to the truth or falsity of prior statements, such questioning may be permitted; the trial court, however, must be ever alert to protect the witness against being badgered or tricked into statements unintended by the witness." (*People v. Southack* (1952) 39 Cal.2d 578, 590.) The Bogdans have not demonstrated an abuse of discretion.

The Bogdans assert the court "would not allow counsel to examine Pace on [the] fact that [the] sellers had disclosed to her [the] house needed repairs; holding it was irrelevant." The passage in the reporter's transcript cited by the Bogdans, however, shows the court did not bar questioning on all repairs, only inquiry into repairs that were irrelevant to the issues in the case. The question the court found irrelevant was, "Isn't it true and correct that the sellers actually disclosed to you that the house needed updating; a new kitchen, new flooring, a complete remodel. It had galvanized pipes that needed to be replaced. Isn't that true?" The Bogdans have not demonstrated how the

question sought relevant information, and they have not shown an abuse of discretion.

Next, the Bogdans fault the trial court for sustaining the objection to their question, "When your mold inspector informed you on page 1 of his report that his report was for your use only, was that because you wanted to conceal or keep the Bogdans from finding out about what had been found?" The court ruled the question called for speculation. The Bogdans do not identify any error in the court's ruling. "No reasons being assigned or set forth in the brief why the rulings of the court were not correct, it is not incumbent upon an appellate court to look for reasons." (*Brown v. Brown* (1930) 104 Cal.App. 480, 489.)

Finally, without argument or citation to authority, the Bogdans assert the court would not accept one of their expert witnesses as a qualified expert in subniche real estate as it pertains to disclosures, and therefore restricted his testimony. "Issues not supported by argument or citation to authority are forfeited." (*Needelman*, *supra*, 239 Cal.App.4th at p. 762.)

D. *Evidence of Damages*

The Bogdans assert the court would not allow their mold expert to testify whether certain individuals are more sensitive or susceptible to exposure despite the expert having a doctorate in public health. They also complain they were not permitted to ask a medical expert if family history made the Bogdan daughter more susceptible or prone to allergic rhinitis. In neither case do they acknowledge the grounds for the court's ruling or provide argument demonstrating the ruling was erroneous. " ' "An appellate court cannot assume the task of discovering the error in a ruling and it is the duty of counsel by argument and the citation of authority to show the reasons why the rulings

complained of are erroneous. Contentions supported neither by argument nor by citation of authority are deemed to be without foundation and to have been abandoned." ' " (*In re Phoenix H.*, *supra*, 47 Cal.4th at p. 845.)

The Bogdans next complain that although the trial court allowed some portions of their Kaiser medical records to be admitted, it "denied them the right to reference or admit into evidence, [a] key treating medical record documenting medical diagnosis made at the time as being 'Exposure to Mold.' " (Underscoring omitted.) They refer this court to 20 pages of the reporter's transcript, during which time the court ruled on the admissibility of more than 20 different exhibits supplied by the Kaiser custodian of records, but they do not identify which exhibit this "key treating medical record" is, what the record contained, why it was excluded, or why they believe the ruling was erroneous. The Bogdans have the burden of proving error with "factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited." (*Okorie*, *supra*, 14 Cal.App.5th at p. 599.) We deem the argument forfeited.

E. *Denial of Impeachment Through Rebuttal*

The court refused to permit a tenant of the home in 2019 to testify to the condition of the home at that time because the issue in the litigation was the condition of the home in 2017. The Bogdans argue the testimony was relevant rebuttal testimony to impeach the credibility of Polak, who opened the door to this evidence when he testified tenants after the Bogdans had not complained of seams separating on drywall.

Selectively quoting from the Law Revision Commission's comments to Evidence Code section 780, the Bogdans argue Evidence Code sections 780 and 351 together "eliminate[d] the inflexible rule" excluding evidence relevant to the credibility of the witness unless the evidence is independently relevant to the issue being tried. This is true as far as it goes, but the comment in full states, "This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Section 352, the court has substantial discretion to exclude collateral evidence. The effect of Section 780, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge." (7 Cal. Law Revision Com. Rep. (1965) p. 1, reprinted in Deering's Ann. Evid. Code (1986 ed.) foll. § 780, pp. 421–422.) Accordingly, " '[t]he decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion.' " (*Green v. Healthcare Services, Inc.* (2021) 68 Cal.App.5th 407, 420.)

The Bogdans assert the law permits rebuttal evidence and claim the court did not appreciate that the evidence was offered for impeachment, but they do not argue the court's decision to exclude this rebuttal testimony was an abuse of discretion. They have therefore failed to demonstrate error.

The Bogdans claim the court interrupted their examination of this rebuttal witness; the court asked the witness a cumulative question intended to place special emphasis on the information and diminish the witness's relevance in the eyes of the jury; and the "[c]ourt interrupted [the] witness before he could complete [his] answer, asking [the] same cumulative question to give extra Special Emphasis." The record does not show that the court's

question was intended to place any emphasis on the response or that the court interrupted the witness for any reason other than to head off a nonresponsive response. Moreover, as the witness was excused without giving substantive testimony beyond the fact that he lived in the house in 2019, his "relevance in [the] eyes of the jury" could not be diminished.

Finally, the Bogdans contend the court would not allow them to ask the witness if he had any personal knowledge of a roof leak in the home in 2017 and "cast negative aspersion to counsel for asking [the] question." Without argument, the Bogdans conclude the court usurped their right to present relevant evidence and that the court's rationale for precluding the witness's testimony overlooked that they were presenting the evidence for impeachment. The Bogdans have failed to support this claim of error with coherent argument and legal authority. "Every argument presented by an appellant must be supported by both coherent argument and pertinent legal authority. [Citation.] If either is not provided, the appellate court may treat the issue as waived. [Citation.] Accordingly, we deem this issue waived." (*Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 743.)

IV. Nonsuit

The Bogdans contend the trial court erroneously granted nonsuit on several causes of action and the request for punitive damages. "We independently review an order granting a nonsuit, evaluating the evidence in the light most favorable to the plaintiff and resolving all presumptions, inferences and doubts in his or her favor. [Citations.] 'Although a judgment of nonsuit must not be reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture, reversal is warranted if

there is "some substance to plaintiff's evidence upon which reasonable minds could differ . . . ." ' [Citation.] In other words, '[i]f there is substantial evidence to support [the plaintiff's] claim, *and* if the state of the law also supports that claim, we must reverse the judgment.' " (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124–1125 (*Wolf*).)

A. *Retaliatory Eviction*

Civil Code section 1942.5, subdivision (a) provides that if a lessor retaliates against a lessee because the lessee exercised particular rights or complained to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default on rent payments, "the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days" of the lessee taking any of a number of steps to exercise legal rights. When the trial court considered the motion for nonsuit on the retaliatory eviction claim, the central question under discussion was whether the Bogdans had been caused to quit the home involuntarily; the Bogdans did not argue they had produced evidence of any of the other three conditions set forth in Civil Code section 1942.5, subdivision (a).

The Bogdans were unable to identify evidence they quit the dwelling involuntarily. Instead, their counsel stated he believed "any adverse action taken within 180 days of the tenants exercising their rights" stated a cause of action under Civil Code section 1942.5, subdivision (a). The court granted nonsuit on the Bogdans' retaliatory eviction claim because there was no evidence Pace recovered possession of the dwelling in any action or proceeding, caused the Bogdans to quit involuntarily, increased the rent, or decreased services during the relevant time period.

On appeal, the Bogdans do not identify any evidence they presented or attempted to present in the trial court to demonstrate that Pace recovered possession of the residence in an action or proceeding, caused them to quit involuntarily, increased the rent, or decreased any services during the time period set forth in Civil Code section 1942.5, subdivision (a). Instead, they repeat their earlier arguments about evidentiary rulings, refer this court to parts of the opening brief that do not contain content supportive of their argument, complain that defense counsel was discourteous, and argue judicial notice should have been taken of the filing date of the unlawful detainer action. This is insufficient to establish error. (*Okorie*, *supra*, 14 Cal.App.5th at pp. 599–600 [appellant must present a cognizable legal argument in support of reversal of the judgment].)

The Bogdans also argue, as they did in the trial court, that Civil Code section 1942.5 must be understood in conjunction with Civil Code section 1942.4, which concerns the demand, collection, and increase of rent. However, nothing in Civil Code section 1942.4 expands the conditions for retaliatory eviction set forth in section 1942.5, subdivision (a), nor do the Bogdans provide any authority to support their theory.

As the Bogdans have not demonstrated the existence of substantial evidence to support their claim and that the state of the law also supports that claim, they have not established any error by the trial court in granting the motion for nonsuit on this cause of action.

B. *Constructive Eviction*

"An eviction is constructive if the landlord engages in acts that render the premises unfit for occupancy for the purpose for

which it was leased, or deprive the tenant of the beneficial enjoyment of the premises." (*Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1152.) The trial court granted nonsuit on the Bogdans' cause of action for constructive eviction on the ground they had presented no evidence of continuing issues of habitability after the City of Long Beach issued a correction letter in April 2017. The Bogdans argued they complained to their personal doctors after April 2017, but the court asked why they would complain of habitability issues to a hospital rather than complaining to the landlord or the city as they had done before. Their counsel said the relationship with Pace had soured and they had exhausted their efforts with her, and he said they complained to the city, but the court pointed out the evidence presented of complaints to the city was all before the city's letter in April stating the problems had been corrected. The Bogdans' counsel said he could not think of any evidence that the Bogdans had reported habitability problems or complained of constructive eviction after April 2017, and the court granted nonsuit on this cause of action.

On appeal, the Bogdans repeat their claim that they complained to their doctor, and they assert the court's ruling was incorrect because Kristen Bogdan had testified the Bogdans made complaints after April 2017. But the testimony to which the Bogdans direct the court shows that on cross-examination Kristen Bogdan maintained they had made written complaints but could not identify any evidence of them. The Bogdans have not demonstrated any error by the trial court.

C. *Concealment*

The Bogdans' argument that the court erred in granting nonsuit on the concealment cause of action contains no

intelligible legal argument, scant citations to the record, and no authority to support their claim of error. "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' " (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

D. *Intentional Infliction of Emotional Distress*

The Bogdans argue the court erred when it granted nonsuit on the cause of action for intentional infliction of emotional distress. However, when they describe the evidence they claim supported this cause of action, in all but one instance they refer to their counsel's argument on the nonsuit motion rather than to any evidence in the record. Their only reference to the record comes in a sentence in which they say the court was incorrect when it held there was no evidence of severe emotional distress: They say the medical records mentioned "stress" and Anabelle suffering "anxiety." The Bogdans fail to make any argument as to how these notations in medical records demonstrated any error in the court's ruling that they had failed to demonstrate severe emotional distress, and they have therefore failed to meet their burden to demonstrate error on appeal. (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1457 (*Multani*).)

E. *Negligence Per Se*

In this portion of the brief, the Bogdans first dispute individual comments made by the trial court during arguments on the motion for nonsuit. This is insufficient to meet their burden of demonstrating there is substantial evidence to support

their claim and that the state of the law also supports the claim. (See *Wolf*, *supra*, 162 Cal.App.4th at pp. 1124–1125.) They then compare the facts of their case to the facts in *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, but they fail to support their statements of fact with references to the record. "Statements of fact that are not supported by references to the record are disregarded by the reviewing court." (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 947 (*McOwen*).) The remainder of their argument consists of citations to the holdings of three cases and the recitation of evidence that they claim showed Pace failed to exercise ordinary care in her management of her property, but they do not explain how these cases establish error or apply their principles to the evidence in this matter. This is insufficient to demonstrate that the court erred in granting nonsuit on this cause of action. (*Multani*, *supra*, 215 Cal.App.4th at p. 1457.)

F. *Prayer for Punitive Damages*

Under the heading, "Prayer for Punitive Damages," the Bogdans state that it was malicious to subject them to oppressive living conditions, but they provide no citations to evidence in the record to support this statement; they refer this court only to their trial court argument against the nonsuit motion. The remainder of the Bogdans' argument is not directed toward punitive damages but is a conclusory argument that the court erred when it granted nonsuit on the causes of action for retaliatory eviction and concealment. The Bogdans have not presented meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error, and their claim is therefore forfeited. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408.)

V. Jury Instructions

Because the Bogdans' arguments concerning the jury instructions fail to "[s]tate each point under a separate heading or subheading summarizing the point," (Cal. Rules of Court, rule 8.204(a)(1)(B)), it is difficult to ascertain what instructional rulings they intend to challenge.

It appears the Bogdans argue the court should have instructed the jury with CACI No. 418, concerning the presumption of negligence per se. They note that on appeal this court must review the evidence most favorable to the contention that the instruction was applicable, but they fail to set forth evidence in the record that warranted giving the instruction. They identify four words of testimony by one witness and refer the court to "Trial Exh. 31 & facts supra," but they offer no cogent argument as to how this evidence supported instructing the jury with CACI No. 418. They have failed to show any error. "We need not address points in appellate briefs that are unsupported by adequate factual or legal analysis." (*Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com*. (2006) 135 Cal.App.4th 793, 814.)

The Bogdans assert they requested "instruction no 29 breach of implied warranty of habitability based on negligence. Statutory language Health Safety Code 17920.03," but the court elected to give CACI No. 4320. They state the court "refused to give special jury instructions on relevant statutes/housing codes" but do not present any argument why this was error: They simply list one case with the parenthetical text "(held improper)." (Underscoring omitted.) Apparently still referring to their special instruction No. 29, they complain that the court refused to give instruction on two sections of the Health and Safety Code, but they neither identify any evidence in the record that would have

supported giving an instruction concerning those provisions, nor offer any argument demonstrating error by the trial court. "[W]e may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287.)

Next, the Bogdans argue the court erred by not giving "[v]icarious responsibility instruction (CACI 3700 series)" and CACI No. 3713 on nondelegable duty. They refer to evidence concerning Pace's handyman and mention one decision holding that "agents of the landlord could bear liability," but they fail to offer cogent argument demonstrating how the evidence supported the giving of CACI No. 3713 or any of the other instructions in the series. Similarly, the Bogdans state the court refused to give CACI No. 3923 "even though it had said it would after defense brought up insurance, collateral source benefits and Bogdens [*sic*] forced to move for mistrial, supra," but provide no argument as to why it was error to refuse this instruction.

Finally, the Bogdans state other, unspecified jury instruction errors occurred, and the court "impaired Bogdan ability to claim damages causing jury to believe habitability issues claimed were not substantial." They make a series of assertions about what the evidence showed, but they do not identify what jury instructions the court should or should not have given, nor do they explain how the evidence supports their claim of error. "It is not this court's role to construct arguments that would undermine the lower court's judgment and defeat the presumption of correctness. Rather, an appellant is required to present a cognizable legal argument in support of reversal of the judgment and when the appellant fails to support an issue with

pertinent or cognizable argument, 'it may be deemed abandoned and discussion by the reviewing court is unnecessary.' [Citation.] Issues not supported by argument or citation to authority are forfeited." (*Needelman*, *supra*, 239 Cal.App.4th at p. 762.)

VI. Pace's Motion for Attorney Fees and for Relief From Excusable Neglect

Pace timely filed a memorandum of costs, but it lacked a verification; and she did not timely file her motion for attorney fees. She filed a motion for relief under section 473, subdivision (b), arguing her failures resulted from her counsel's excusable neglect in light of the COVID-19 pandemic. The trial court concluded Pace was not entitled to section 473 relief because she had not established excusable neglect; however, the court declined to strike her memorandum of costs because it substantially complied with the requirements for a memorandum of costs.

On appeal in case No. B309780, Polak contends the motion for attorney fees was filed in a timely manner because, pursuant to a series of emergency orders relating to the pandemic, every day between April 12, 2020, and September 8, 2020, was a holiday for purposes of computing the time for filing papers with the court. Polak does not acknowledge that the emergency orders provided that those dates were holidays for purposes of computing the time for filing papers only "if the above-described emergency conditions substantially interfere with the public's ability to file papers in a court facility on those dates," much less argue the emergency substantially interfered with the public's ability to file papers. The record, moreover, indicates Pace filed a notice of ruling during this time period, proving both her ability and awareness of her ability to file documents during this time.

She did not make a showing that she tried to file her motion but it was rejected. Polak has not demonstrated any error.

As for Pace's motion for relief, section 473, subdivision (b) provides relief from a judgment, dismissal, order, or other proceeding taken against a party through his or her "mistake, inadvertence, surprise, or excusable neglect." The motion is directed to the sound discretion of the trial court, and all doubts should be resolved in favor of securing trial on the merits. Appellant bears the burden of demonstrating that the order is an abuse of discretion, meaning that it exceeded bounds of reason. (*Uriarte v. United States Pipe & Foundry Co*. (1996) 51 Cal.App.4th 780, 787.)

Here, Pace's counsel argued that because of COVID-19, "there was tremendous disarray and tremendous problems going on in [their] office." According to counsel, the motion for attorney fees required attorneys, paralegals, and secretarial time, "[a]nd we just simply did not have any of those people." Due to COVID-19 restrictions, he said, "[W]e were unable to coordinate and recognize the needs to file this" motion, and this constituted excusable neglect.

The court observed the unverified memorandum of costs was due and filed before the pandemic orders were issued or the courts were closed. Moreover, Pace did not argue her attorney's office was completely closed, her attorney was unable to work from home, her attorney was ill, or some other circumstance caused by the pandemic rendered the failure to timely file the attorney fee motion excusable neglect. The court found counsel's delay in filing to be inexcusable: "And if this was a two-week delay, I could understand that, but we're talking about two-months delay, and it's negligent, I don't find it to be excusable."

Polak has not met his burden of demonstrating the order was an abuse of discretion. He asserts the court "utterly disregarded the Emergency Orders" establishing holidays due to the pandemic, but as we have discussed, he did not demonstrate the pandemic substantially interfered with the public's ability to file papers in a court facility during the relevant time period. Polak also contends the court "disregarded Appellant's [Polak's] arguments that, under the extraordinary circumstances created by the pandemic, this was excusable neglect," but the court did not disregard the arguments; it found them unconvincing. Counsel asserted in the trial court that consequences of the pandemic prevented them from filing the motion in a timely manner, but these generalized statements of burden did not, the court noted, include circumstances establishing Pace was prevented from filing her attorney fee motion in a timely manner, such as ill counsel or complete closure of their office. At most, Polak has established the evidence presented would have permitted the court to grant relief, not that it was an abuse of discretion not to do so. A showing on appeal under the abuse of discretion standard is "insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118.)

VII. The Bogdans' Cross-appeal

In case No. B309780, the Bogdans cross-appeal, arguing the trial court erred when it denied their motions to strike Pace's memorandum of costs, when it awarded expert costs, and when it denied their request for cost of proof sanctions.

A. *Memorandum of Costs*

The Bogdans argue the court should have stricken Pace's memorandum of costs because it was not verified. According to the Bogdans, because California Rules of Court, rule 3.1700(a)(1) requires that the memorandum of costs "must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case," the absence of the signature obligated the court to grant their motion to strike. The Bogdans base their argument on the use of the term "must" in rule 3.1700(a)(1), and they rely on cases that require strict compliance with the time period allowed for filing a memorandum for costs to support their argument that the verification signature requirement should be similarly construed. They argue relief was only available to Pace through a motion for relief under section 473, but the court found no excusable neglect here.

The cases cited by the Bogdans are not controlling because "they are all distinguishable from the present situation where the petition was timely presented but defective in form." (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 917 (*United Farm Workers*).) The time limit's "manifest purpose . . . is to limit the time, after verdict or judgment, within which the question of costs, if it arises, may be definitively determined, so that, when ascertained and taxed, the costs may be included in the judgment, to the end that the party entitled thereto may secure his rights as speedily as practicable." (*Griffith v. Welbanks & Co*. (1915) 26 Cal.App. 477, 480.) It follows that the time limits imposed by law are mandatory and "substantially strict compliance" is required. (*Ibid*.)

In contrast, "[t]he objective of a verification is to assure good faith in the averments or statements of a party." (*Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1498.) "[T]he failure to verify a pleading—even where the verification is required by statute—is a mere defect curable by amendment," even if the statute of limitations has run on the time to file the original complaint, since verification of a complaint is not a jurisdictional requirement. (*United Farm Workers*, *supra*, 37 Cal.3d at p. 915.) The Bogdans do not offer a convincing reason to hold a memorandum of costs to a stricter standard than a pleading. They assert that "[t]he lack of a proper verification renders the costs bill meaningless, and unenforceable and misleads the party it is being sought against as to what legal obligations or burden of proof it may be tasked to in order to properly respond to the memorandum of costs," but we are unable to find any such statement in the authority they cite for support for this assertion, *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774. We conclude the court did not err when it determined that the timely-filed but defective memorandum of costs, later supplemented by an identical verified memorandum, substantially complied with California Rules of Court, rule 3.1700.

B. *Expert Costs*

Section 998 " 'establishes a procedure to shift costs if a party fails to accept a reasonable settlement offer before trial. The purpose of the statute is to encourage pretrial settlements.' [Citation.] If the party who prevails at trial obtains a judgment less favorable than a pretrial settlement offer submitted by the other party, then the prevailing party cannot recover its own postoffer costs but must pay its opponent's postoffer costs,

including, potentially, expert witness fees." (*Oakes v. Progressive Transp. Servs., Inc.* (2021) 71 Cal.App.5th 486, 497 (*Oakes*).)

Here, the court awarded expert witness fees incurred by Pace after the Bogdans refused her section 998 offer. The Bogdans argue the court erred because the section 998 offers were "illusory" in nature. The offers to compromise included four conditions, one of which read, "Judgment cannot and will not be entered against the offering party without the written authority from offering party." The Bogdans argue the offer was invalid because "even if plaintiffs signed their acceptance, no judgment could be entered on the 998 [offer] unless and on condition that plaintiff first request and obtain defendant's subsequent 'written authority' or consent."

We agree this condition invalidated the section 998 offers. Section 998 offers "must . . . be *unconditional*. [Citation.] Thus, for example, an offer to two or more parties, which is contingent upon all parties' acceptance, is not a valid offer under the statute." (*Barella v. Exchange Bank (*2000) 84 Cal.App.4th 793, 799 (*Barella*).) Additionally, because the trial court has to determine whether the value of the offer exceeds the trial verdict, a valid section 998 offer must be sufficiently certain to be capable of valuation. (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1050 (*MacQuiddy*).) Whether an offer is sufficiently specific and certain under section 998 is an issue we review de novo. (*Oakes*, *supra*, 71 Cal.App.5th at p. 497.)

Here, as the Bogdans argue, even if they had accepted the section 998 offers, the accepted offers could not have been filed with the clerk of the court with proof of acceptance so that judgment could be entered. (§ 998, subd. (b)(1) ["If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly"].) Instead,

they would have had to obtain some undefined separate written consent from Pace before judgment could be entered. This vague provision, making the section 998 offers contingent on Pace's later permission, rendered the offer conditional and not sufficiently certain to be capable of valuation. (See *Barella*, *supra*, 84 Cal.App.4th at p. 799; *MacQuiddy, supra*, 233 Cal.App.4th at p. 1050; see also *Duff v. Jaguar Land Rover North America, LLC* (2022) 74 Cal.App.5th 491, 500 [section 998 offer offering repurchase of vehicle at a base amount to a "higher amount" if party provided documentation that a higher amount was warranted was not sufficiently specific to be a valid offer to compromise].) Accordingly, we conclude the trial court erred when it concluded the section 998 offer was valid and awarded Pace expert witness fees on this basis.[3]

C. *Denial of Cost of Proof Sanctions*

The Bogdans argue the trial court erroneously denied their motion for cost of proof sanctions pursuant to section 2033.420, subdivision (a), for an unspecified number of facts they claimed they were required to prove at trial because Pace unreasonably denied their requests for admissions. On appeal, they set forth general law relating to expenses incurred in proving matters not admitted in response to requests for admissions, then assert "the responses to the relevant requests for admissions were improper. Several of the answers were neither admissions nor denials, nor did they indicate that a reasonable inquiry had been made.

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[3] Our decision on this ground makes it unnecessary to address the Bogdans' arguments that the section 998 offer was not made in good faith and carried no reasonable explanation that they could be accepted.

Plaintiffs were forced to prove these facts at trial which they did and sanctions in accordance with [section] 2033.420 were justified." This claim is not supported by any citations to the record. Similarly, the Bogdans state that Pace "asserted boilerplate meritless objections to all of plaintiff's requests: none of which were sustained in whole or in part by the court," but they do not identify where in the record facts supporting this assertion may be found. We disregard factual assertions not supported by references in the record. (*McOwen*, *supra*, 153 Cal.App.4th at p. 947.)

The Bogdans then present a chart that purportedly states the request for admissions, Pace's response, and the evidence at trial proving the fact requested to be admitted. Here again, the Bogdans do not provide citations to the record to permit this court to review the requests for admissions and Pace's responses. "Any reference in an appellate brief to matter in the record must be supported by a citation to the volume and page number of the record where that matter may be found. (Cal. Rules of Court, rule 8.204(a)(1)(C).) This rule applies to matter referenced at any point in the brief, not just in the statement of facts." (*Sky River LLC v. County of Kern* (2013) 214 Cal.App.4th 720, 741.) Moreover, as part of the "evidence" at trial proving the requested admissions true, the Bogdans repeatedly cite to their statement of facts in their opening brief in case No. B306264. Statements in appellate briefs are obviously not evidence presented in the trial court. By providing no actual argument as to the individual requests for admission they claimed were proven at trial, only a chart listing where this court may look in the record for evidence to demonstrate they proved the subject of the requests for admission, the Bogdans " 'apparently assum[e] this court will construct a theory supportive of" [their] appeal, but that 'is not

our role.' " (*Jewish Community Centers Development Corp. v. County of Los Angeles* (2016) 243 Cal.App.4th 700, 716.) The Bogdans have failed to meet their burden of showing trial court error.

DISPOSITION

The judgment in case No. B306264 is affirmed. In case No. B309780, the order denying the Bogdans' motion to strike or tax costs is reversed as to expert witness costs. We remand for the trial court to recalculate the award of costs to Pace consistent with this opinion. In all other requests, the orders in case No. B309780 are affirmed.

The parties are to bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, Acting P. J.

We concur:

WILEY, J.

HARUTUNIAN, J.*

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* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.